In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-663

ANITA LEE VAUGHN,

Petitioner,

v.

G. D. SEARLE & COMPANY,
a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon filed June 26, 1975, and its orders denying the first and second motions for rehearing filed August 6, and September 4, 1975.

OPINION BELOW

A copy of the opinion of the Supreme Court of Oregon June 26, 1975, is attached as Appendix A, infra, A-1. It is reported at 75 Or. Adv. Sh. 2265, — Or. —, 536 P.2d 1247 (1975). Copies of the orders

denying rehearing are attached as Appendices B & C, infra, A 11 and A 12, respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED FOR REVIEW

A civil jury case was appropriately plead, proved and submitted to a jury on five separate and distinct independent and unrelated factual grounds, any one of which would sustain a verdict for plaintiff. The jury returned a general verdict for plaintiff. The jury was not asked to detail the specific grounds for its verdict. Defendant then appealed to the Oregon Supreme Court. The latter court reversed because it believed there was insufficient factual support to submit one of the five independent grounds to the jury. Despite the presence of four additional and independent bases for submitting the case to the jury, as well as a recent Oregon decision substantially on all fours with the instant case, the court directed the trial court to enter a directed verdict for defendant as to the entire case, thus prohibiting and precluding a new trial.

Even though plaintiff timely and appropriately raised the point, in two petitions for rehearing, that this ruling was tantamount to a deprivation of a trial by jury and of due process and equal protection, under

both Federal and State Constitutions, the state Supreme Court refused to alter its ruling, or to consider the four remaining independent grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

I. U. S. Constitution, Amendment VII.

"Trial by jury in civil cases. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

II. U. S. Constitution, Amendment XIV. Section I.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONCISE STATEMENT OF THE CASE

Plaintiff developed partial blindness in both eyes, left sided motor weakness, intellectual dysfunction, and the loss of 20 points of her I.Q. following a stroke, as a direct result of her consumption of defendant's birth control pill.

It was established that defendant failed to adequately warn any of the following of the latent dan-

gers in its pill, and in fact assured them the product was safe, though defendant knew the true facts were otherwise:

(a) Dr. N., who originally prescribed the pill for plaintiff, 21 months before her stroke;

(b) Dr. M., who switched plaintiff from the 21-day to the 28-day pill (which is the same product, except for the addition of seven placebos) four months prior to her stroke;

(c) any of the doctors or other personnel at the Planned Parenthood Association, where plaintiff periodically received refills of her prescription;

(d) Dr. C., who saw plaintiff on two occasions, two and four weeks prior to her stroke, and after she began to manifest early warning signals of stroke;

(e) Dr. H., who saw plaintiff ten days before her stroke, and after she had many more such symptoms; and

(f) plaintiff herself.

All the above relied on defendant's assurances, either directly or—in plaintiff's case—indirectly. As a result, plaintiff continued to take the pill for 21 months until her stroke. The jury returned a general verdict for plaintiff and the trial court entered judgment thereon.

On appeal the Oregon Supreme Court[1] expressly approved and readopted a decision it had made six months earlier, which recognized that a case of this kind could be appropriately submitted to the jury where it was shown that plaintiff's injuries were caused by a drug product and that the manufacturer did not give a proper warning to either the *treating or prescribing* doctors. The court did not disagree that all these factors had been shown in the case at bar. In no way did the court modify or overrule its earlier decision, or change any of the elements of the claim. Nevertheless, inexplicably, the court held that since (it felt) plaintiff did not sufficiently detail all her prestroke symptoms to the two *treating* doctors (C & H), therefore and per set, she could not recover.

Plaintiff promptly and appropriately raised in two motions for rehearing the claim that the Court's holding violated the federally guaranteed right to jury trial by depriving plaintiff of the right to have questions of fact determined by the jury. Nevertheless, the Oregon Supreme Court declined to consider the fact that had defendant warned either of the two prescribing doctors, the personnel and doctors at the Family Planning Center, or the plaintiff herself, plaintiff would not have been exposed to defendant's product in the first instance. All indicated they relied heavily on defendant's blandishments.

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[1] *Vaughn* v. *G. D. Searle & Co.*, 75 Adv. Sh. 2265, — Or. —, 536 P.2d 1247, 1248 (1975), citing *McEwen* v. *Ortho Pharmaceutical*, 99 Adv. Sh. 2357, 2362-2367, — Or. —, 528 P.2d 522 (1974).

STAGE IN PROCEEDINGS WHEN THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

Within days of the ruling by the Oregon Supreme Court, petitioner raised the federal question of deprivation of a jury trial and of due process under the 7th and 14th Amendments, by means of two petitions for rehearing. It could not have been raised earlier since the violation of constitutional rights did not occur until the Oregon Supreme Court had acted to deprive plaintiff of the jury verdict which she had obtained. Existing Oregon law gave petitioner a clear claim to be tried by a jury; however, the court's process of review deprived plaintiff of that claim and totally erased the jury verdict. It also forever barred petitioner's right to a jury trial.

DIRECT AND CONCISE ARGUMENT

(A) Reasons for allowance of the writ.

This case raises a critical and substantial federal question. Namely, what minimal standards must state courts follow in protecting and preserving the right to jury trial in those civil cases which are guaranteed a jury trial by virtue of the Fourteenth Amendment.

There is a profound disagreement, disparity and fluctuation among the several states with respect to the circumstances when an appellate court may set aside and/or overturn findings of facts by juries or trial judges. This Court must establish the minimal federal standards by which the constitutionally guaranteed right to jury trial requires state courts to maintain the division between the functions of judge and jury.

The instant case is a high water mark in appellate disregard of fact findings by the fact finders. It is an appropriate case for this court to begin a definition of what is the true meaning of a trial by jury in state civil matters under the 14th and 7th amendments. Is it merely the naked right to present a case to a jury but with reserved unbridled power to ignore the jury's determination later? Was its inclusion in the Constitution only a grandiloquent gesture meaning little in the trial of civil matters in state courts?

(B) Concise argument.

There is scarcely a subject about which there is more strident disagreement and greater fluctuation and/or disparity between the states (and often intra state) than the question:

> When can a state appellate court set aside, reverse, overturn, and/or ignore fact determinations by juries or other fact finders where the court is not changing legal standards but is exercising review in a manner which destroys the jury's function by ignoring the constitutionally mandated division of functions between judge and jury?

This Court has recognized that a fundamental and inherent part of due process under the 14th Amend-

ment is the right to a jury trial in an appropriate case.[2]

Still, a mere theoretical, academic or empty right means nothing.

The myriad of divergent, often inconsistent, standards which have been and are being applied in the several states with respect to the circumstances when jury verdict factual determinations may be overturned is astonishing. There is massive confusion as to what the federally guaranteed right to jury trial requires by way of dividing the functions of judge and jury at the trial level and in the process of judicial review within a state court system. Some representative illustrations appear in Appendix D, infra, A 13. They cover the entire spectrum.

Acutely needed is the demarcation by this Court of minimal constitutional standards dividing the function of judge and judge and the minimal constitutional standards restraining state appellate courts from invading the rights of parties to a trial by jury.

Petitioner's case is a flagrant example of appellate obliteration of the federally guaranteed right to a jury trial.

From a practical point of view, it would have been far better and less expensive if petitioner had been denied a jury trial at the outset. Oregon case law gave

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[2] *Duncan* v. *Louisiana*, 391 U.S. at 156; *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500; *Magenau, Administrator* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273; cf. *Apodaca* v. *Oregon*, 406 U.S. 404.

plaintiff a clearly defined cause of action. Plaintiff's proofs established each and every element of that cause of action. The jury found that plaintiff's evidence proved that cause of action. But, in the end, the Oregon Supreme Court deprived plaintiff of the right to have the facts determined by the jury by an arbitrary and de novo review of the facts, thus second guessing the jury. Secondly, though she was given a five-week trial in the trial court, four of the five independent factual issues (see pp. 3-5, supra) the jury resolved—any one of which per se was sufficient under Oregon law to have sustained the verdict—were totally ignored by the Oregon Supreme Court in reaching its decision. Practically speaking, the result is the same as no trial. The end result deprived plaintiff of the constitutional right to a jury trial without remand for a new trial.

By whatever name, such derogation of a jury trial challenges constitutional principles long regarded as sacrosanct, and constitutes a denial of right of effective access to the court, right to be heard on the merits, right to notice and opportunity for hearing, right to confront and cross examine adverse witnesses—all of which are denials of procedural due process.[3]

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[3] *Goss* v. *Lopez*, — U.S. —, 95 S. Ct. 729 (1975); *Covey* v. *Town of Somers*, 351 U.S. 141, 146 (1956); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); *Goldberg* v. *Kelly*, 397 U.S. 254-269 (1970); *Lambert* v. *People of the State of California*, 355 U.S. 225, 228 (1957), mod. and *reh. den.* 355 U.S. 937 (1958); *Ex Parte Young*, 209 U.S. 123, 147-8 (1908); *Turner* v. *Wade*, 254 U.S. 64, 67 (1920); *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1864).

In 1830 Justice Story wrote *(Parsons* v. *Bedford,* 3 Pet. 433, 446):

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people."[4]

George Washington, in writing to the Marquis deLafayette (while the debate between the Federalists and anti-Federalists raged) on the day the constitution was ratified by the sixth state (Maryland) said *(11 The Writings of George Washington* 254-9):

> "(T)here was not a member of the convention, I believe, who had the least objection to what is contended for by the advocates for a Bill of Rights and Trial by Jury".

The unmistakable intent of the framers of the 7th and 14th Amendments to foster and preserve a trial by jury in civil cases should not be shunted aside in favor of some sort of amorphous reweighing of the facts by the court. The standards which are used in the several states (and sometimes within the same

[4] See Appendix E for further discussion.

state) are in hopeless disagreement and disarray. In some there is virtually no appellate retesting of facts. In others—including Oregon, in this case—the court does so an alarming percentage of the time.

There is an urgent and pressing need for this Court to establish the true meaning of right to a jury trial.

A jury trial is—in the end—only an exercise in futility if it is subsequently given no real vitality.

CONCLUSION

The Fourteenth Amendment, we submit, quite plainly guarantees some minimal federal standards for a right to jury trial in cases tried in state courts under state law.

This case flagrantly violates those standards.

It is of national significance that this case be reviewed to:

(a) spell out those standards;

(b) minimize the mass confusion which presently exists; and

(c) end a pattern which has developed and is developing, where state courts have often drained jury trials of any true meaning or significance.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

ANITA LEE VAUGHN,

Respondent,

v.

G. D. SEARLE & COMPANY,
a corporation,

Appellant.

75 Or Adv 2265, — Or —, 536 P2d 1247

Supreme Court of Oregon,
In Banc.

Argued and Submitted May 8, 1975.
Decided June 26, 1975.

HOWELL, Justice.

This is a negligence action in which the plaintiff, Anita Vaughn, seeks damages from the defendant, G. D. Searle & Company, a manufacturer of oral contraceptives, for injuries suffered as the result of a cerebral vascular accident (stroke) allegedly caused by the ingestion of the defendant's drug, Ovulen. Plaintiff alleges that the defendant was negligent in failing to provide adequate warnings to the medical profession concerning the dangerous propensities of its product. The jury returned a verdict for the plaintiff, and the defendant appeals.

Defendant raises numerous assignments of error. However, we need only consider the questions raised by defendant's first assignment—that the trial court

erred in denying defendant's motion for a directed verdict. This motion was based in part upon the contention that plaintiff failed to present any evidence with regard to the element of causation.

[1] In McEwen v. Ortho Pharmaceutical, 99 Adv. Sh. 2357, 528 P.2d 522 (1974), this court discussed in detail the duty of a drug manufacturer to provide timely and adequate warnings to the medical profession with regard to the dangerous propensities which the manufacturer knows, or has reason to know, are inherent in the use of its drug. It would serve no useful purpose to repeat that discussion in the instant case. Suffice it to say that the manufacturer's duty to warn extends to both the prescribing and treating physician, and the defendant manufacturer is directly liable to the patient for damages suffered as a result of the breach of such duty. A duty exists even though, as in the instant case, the danger threatens only a statistically small percentage of the users of the drug. McEwen v. Ortho Pharmaceutical, supra at 2362-2367, 528 P.2d 522.

With regard to causation, we noted in *McEwen:*

> "The final element of plaintiff's cause of action is proof that each defendant's failure to warn was, in fact, a substantial factor in producing the damage complained of. Within the broad question of causation two sub-issues are implicit. First, we must determine whether each defendant's negligence could be found to be a substantial cause of plaintiff's ingestion of the oral contraceptive manufactured by that defendant. If so, we must then decide whether plaintiff's ingestion of that drug could be found to be a substantial factor in producing her * * * injuries." 99 Or. Adv. Sh. at 2385, 528 P.2d at 538.

We consider the evidence in the light most favorable to plaintiff.[1]

When plaintiff commenced taking defendant's oral contraceptives on February 4, 1969, she was 22 years old and in good health. On that date she went to the clinic of the Planned Parenthood Association of Oregon, Inc., in Portland and requested oral contraceptives. Dr. Clarice Nordlum examined plaintiff and, finding no contraindications[2] in plaintiff's medical history or her examination, prescribed Ovulen-21.

On July 23, 1970, plaintiff returned to the Planned Parenthood Clinic for a follow-up prescription. She reported no complaints with regard to the pill, and Dr. John McCall continued her on defendant's drug.[3]

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[1] In considering the propriety of the court's denial of the motion,

> "the plaintiff is entitled to the benefit of every reasonable inference which may be drawn from the evidence; such inferences may be drawn from defendant's as well as plaintiff's evidence. * * * Moreover, all evidence must be interpreted in the light most favorable to the plaintiff, and it is beyond our power to weigh or evaluate conflicting evidence. * * *." McEwen v. Ortho Pharmaceutical, 99 Or. Adv. Sh. 2357, 2358-59, 528 P.2d 522 (1974).

[2] A "contraindication" is "any special symptom or circumstance that renders the use of a remedy or the carrying out of a procedure inadvisable." Stedman's Medical Dictionary 283 (3rd Unabr. Lawyers ed. 1972).

[3] Actually, plaintiff's prescription was changed from Ovulen-21 to Ovulen-28. They are the same except that Ovulen-28 contains seven placebos so that the patient takes a pill every day.

Plaintiff testified that in August or early September, 1970, she experienced some dizziness and nausea. A few weeks later she had a similar occurrence. In September or October, 1970, plaintiff noticed a darkening of the periphery around her eyes. Prior to this time plaintiff had never been afflicted with either visual problems or unexplained dizziness and nausea.

On October 12, 1970, plaintiff saw Dr. Corrine Chamberlin for a physical examination. She complained of heart palpitations, although she had had no symptoms of heart palpitations for the past month and showed no such symptoms during the examination. Plaintiff reported to Dr. Chamberlin that she was on the pill and that she was very happy with it. Dr. Chamberlin examined the plaintiff but did not do a neurological examination because "there was no headache, no eye symptoms, nothing to indicate any further examination." Based on the medical history which the plaintiff gave the doctor and the doctor's examination, the doctor felt that the plaintiff was in good health. She felt that plaintiff's heart palpitations were functional, meaning that there was nothing organically abnormal about plaintiff's heart.

Plaintiff had another attack of dizziness and nausea, and on October 30, 1970, returned to Dr. Chamberlin. She complained to the doctor that she had been vomiting and dizzy for two days and had had some cold sweats, but was feeling better at the time of the examination. The doctor conducted another physical examination, including a check of blood pressure, pulse and temperature, and an examination of her

eyes, heart, lungs and abdomen. The examination was negative, and the doctor diagnosed plaintiff's ailment as a viral syndrome. The doctor testified that, at that time, such syndromes were "almost epidemic in character" and dizziness and nausea were symptoms. The doctor did not conduct a neurological examination or check the blood vessels in plaintiff's eyes. The doctor gave the plaintiff medication to relieve her dizziness, nausea and constipation.

On the evening of November 6, 1970, while plaintiff was at home, she again became dizzy and nauseated. She went to the emergency room of Gresham Hospital, where she was examined by Dr. Robert Hakala. She complained of dizziness and nausea, saying she "felt rocky on her feet." She stated that she had had a similar episode the prior week. The doctor's examination included a check of plaintiff's blood pressure and pulse; an examination of her head, neck and chest; and a neurological examination. The examination failed to reveal any abnormalities. He diagnosed the source of her dizziness and nausea as labrynthitis, an inflammation of the inner ear mechanism. He gave plaintiff a sedative and advised her to return to the emergency room or to consult her family doctor if the symptoms persisted.

On November 16, 1970, plaintiff became very dizzy and nauseated. Her left arm and leg "gave out" and she was unable to support herself with her left side. Plaintiff was taken to the clinic of Dr. Richard Harris, who diagnosed her condition as a stroke. He felt that her condition might have been caused by use

of defendant's oral contraceptives and immediately withdrew the plaintiff from Ovulen.

At trial, plaintiff contended that the warning which defendant gave to plaintiff's prescribing and treating physicians was insufficient, because it failed to adequately appraise those doctors that the defendant's oral contraceptive could cause cerebral vascular accidents in the user. Plaintiff also presented evidence that she did, in fact, suffer a cerebral vascular accident and that it was the result of her ingestion of Ovulen.

[2] However, as previously mentioned, the primary question in this case is one of causation, that is, whether the defendant's failure to warn was a substantial cause of plaintiff's injuries. The relevant inquiry on that issue is (1) whether plaintiff had premonitory symptoms of a stroke prior to or at the time she saw her treating physicians, and (2) whether such symptoms were made known to those treating doctors. Both parties agree that none of plaintiff's prescribing or treating physicians were negligent in the treatment of plaintiff.[4]

[3] We find that plaintiff has offered no evidence, either direct or indirect, that she ever advised her treating physicians of symptoms which would have alerted them to the possibility of a stroke. Without such knowledge there was no way the physician could have related any warning (that there is a cause-and-effect relationship between the ingestion of the drug and a stroke) to plaintiff's particular case. Thus, there was no evidence that even a properly warned physician would have treated plaintiff differently or removed her from defendant's oral contraceptive prior to her stroke.

[4] Had the physicians been negligent in failing to detect symptoms of a stroke, which a non-negligent physician would have detected, such negligence would not relieve the drug manufacturer from liability for its failure to warn. McEwen v. Ortho Pharmaceutical, supra n. 1 at 2384, note 30.

There was evidence that the premonitory symptoms of a stroke are greatly elevated blood pressure, severe headaches, weakness or numbness of an arm or leg, spots before the eyes, nausea if associated with a headache, and dizziness if associated with a headache.[5] While the plaintiff testified that she had had severe headaches, spots before her eyes, nausea and dizziness prior to the time she saw Dr. Hakala, the last treating physician before her stroke, there is no evidence that she related these symptoms, other than dizziness and nausea, to the doctors.[6]

[5] The symptoms of cerebral vascular accident were also reported as "dizziness, vomiting, headache, scintillating scotomata" ["vague blindness in both eyes; * * * flickering lights surrounding it in both eyes"]; "headache, visual symptoms, or other signs of transient cerebro-vascular insufficiency" (92 Radiology 231, 238 (Feb. 1969)); "young women suffering from stroke while using the oral contraceptives almost always have some warning, usually significant headache, prior to the onset of the paretic event." Second Report on Oral Contraceptives, Advisory Comm. on Obstetrics and Gynecology, Food and Drug Adm. (Aug. 1, 1969).

[6] As noted above, Dr. Chamberlin testified that viral syndromes, accompanied by dizziness and nausea, were "almost epidemic in character" at the time she saw plaintiff.

Dr. Chamberlin, the first treating physician plaintiff saw after taking the pill and after first noticing the nausea and dizziness, testified that plaintiff complained of only heart palpitations at her exam on October 12. After an examination the doctor found her blood pressure and temperature to be normal and that she had no eye symptoms and had no headaches.

Dr. Chamberlin testified that she saw plaintiff again 18 days later. She stated that plaintiff complained of some vomiting and dizziness and cold sweats, but did not complain of headaches. Again her blood pressure and pulse were normal. An examination of her eyes showed negative results.

Dr. Hakala examined plaintiff on November 6, 1970. He said she complained of dizziness and nausea and felt "rocky on her feet." An examination showed a normal blood pressure and pulse. Apparently no mention was made of headaches, and plaintiff did not testify that she reported headaches to Dr. Hakala—only dizziness and nausea.

Even if we accept only nausea or dizziness if associated with headache as a sufficient symptom, it is clear from the testimony of Drs. Chamberlin and Hakala that at no time did plaintiff report any premonitory symptoms of a cerebral vascular accident. On the contrary, Dr. Chamberlin testified:

> "Q. And at either time you saw the patient, she did not have any premonitory symptoms of CVA [cerebral vascular accident], did she?
>
> "A. No, she did not."

Again, if we accept nausea or dizziness if accompanied by headache as premonitory symptoms of a cerebral vascular accident sufficient to alert a physician, the evidence fails from the plaintiff's own testimony. Assuming a question of fact could have been developed if plaintiff contrary to the testimony of the physicians, had testified that she reported severe headaches to the physicians, plaintiff did not so testify. She stated:

> "Q. Now, did you report this [headaches] to Dr. Chamberlin?
>
> "A. I don't remember if I did. I can't determine. * * *."

Plaintiff supported the testimony of Dr. Chamberlin and admitted that she had complained of heart palpitations the first time she saw Dr. Chamberlin. She also stated, "She advised me to come in if I had any more heart palpitations or blurriness." There was no direct testimony from plaintiff that she complained to Dr. Chamberlin of blurriness of vision, and Dr. Chamberlin stated that plaintiff had no eye symptoms.

In summary, plaintiff's doctors had no information which would lead them to believe that plaintiff was about to suffer a cerebral vascular accident.[7] Thus, even if the doctors had been adequately appraised of the cause-and-effect relationship between cerebral vascular accident and the ingestion of defendant's drug Ovulen, they would have had no way of relating that information to plaintiff.

We conclude that there was no evidence that any

failure to warn plaintiff's physicians was a substantial factor in producing plaintiff's injuries and that defendant's motion for a directed verdict should have been granted.

Reversed.

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[7] The evidence in the instant case, when contrasted with that presented in McEwen, clearly shows the inadequacy of plaintiff's case. In McEwen this court upheld a verdict for plaintiff against the manufacturers of oral contraceptives for failure to warn treating physicians that the ingestion of defendants' drugs might cause eye injury. There, plaintiff reported to her treating physicians that she was losing the sight in her right eye. Had her doctors been warned of the causal connection between her eye symptoms and the drug, they could have taken her off the drug and begun corrective measures.

APPENDIX B

STATE OF OREGON
SUPREME COURT

August 6, 1975

Mr. Roger Tilbury
Attorney at Law
1123 S. W. Yamhill
Portland, Oregon 97205

Re: Vaughn v. Searle

Dear Mr. Tilbury:

The Supreme Court today denied respondent's petition for rehearing in the above-entitled case.

Very truly yours,
Adell Johnson
ADELL JOHNSON
Assistant Administrator

APPENDIX C

STATE OF OREGON
SUPREME COURT

September 4, 1975

Mr. Roger Tilbury
1123 S. W. Yamhill
Portland, Oregon 97205

Re: Vaughn v. G. D. Searle & Company

Dear Mr. Tilbury:

The Supreme Court yesterday denied respondent's second petition for rehearing and respondent's objection to the cost bill filed in the above-entitled matter, and also yesterday allowed respondent's motion to stay the mandate until the United States Supreme Court has acted on a petition for a writ of certiorari.

Very truly yours,
J. David Gernant
J. DAVID GERNANT
Legal Counsel

APPENDIX D

STATE COURT REVISION AND REVERSAL OF JURY FACTUAL DETERMINATIONS OCCUR FREQUENTLY USING INCONSISTENT & VACILLATING STANDARDS

There are a myriad of widely divergent, fluctuating and often inconsistent standards which have been and are being applied in the several states with respect to the circumstances when jury verdict factual determination may be overturned, set aside, and even ignored. Many of these standards are highly subjective, and are frequently applied at a time and place far removed from the live witnesses by an appellate court which has had no opportunity to view them. In the end, it often means that the view of 3-9 appellate judges as to the facts is simply substituted for the equally honest and sincere view of the 12 men or women who acted as jurors—and the time and energies of the latter were wasted. At times such appellate decisions have sapped the jury verdict of any true meaning—such as the case at bar.

In the following representative examples the state appellate court recently set aside and held for naught jury *factual determinations* because the appellate court felt the jury verdict was

(a) palpably against weight of evidence;[1]

[1] *Flournoy* v. *Brown*, 200 Miss. 171, 26 So. 2d 351, 353; *Vaughn* v. *Bollis*, Miss., 73 So. 2d 160, 163; *Baker's Adm'r* v. *Frederick*, Ky, 243 SW2d 921, 924.

(b) against the clear or strong preponderance of evidence;[2]

(c) against overwhelming preponderance or great weight of evidence;[3]

(d) absurd;[4]

(e) manifestly against preponderance of evidence;[5]

(f) against manifest weight of the evidence;[6]

(g) clearly mistaken;[7]

(h) against very great preponderance of evidence;[8]

(i) so against preponderance of evidence as to be clearly wrong;[9]

(j) manifestly erroneous;[10]

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[2] *Daniels* v. *Yanyar*, R. I., 94 A.2d 593, 595. *City of Monticello* v. *LeCrone*, 414 Ill. 550, 111 NE.2d 338, 341; *DeFrates* v. *Rowland*, 341 Ill. App. 69, 93 N.E.2d 153.

[3] *Rapant* v. *Ogsbury*, 279 App. Div. 298, 109 N.Y.S.2d 737, 739; *Ohlen* v. *Hagar*, Tex. Civ. App., 212 S.W.2d 253, 256; *Holmes* v. *Am. Gen. Ins. Co.*, Tex. Civ. App., 263 S.W.2d 615, 617; *Doyle Vacuum Cleaner Corp.* v. *F. J. Siller & Co.*, Mich. App., 223 N.W.2d 86, 91, (1974).

[4] *Rapant* v. *Ogsbury*, supra.

[5] *DeFrates* v. *Rowland*, 341 Ill. App. 69, 93 N.E.2d 153.

[6] *Radokovich* v. *Goldblatt Bros.*, 342 Ill. App. 200, 95 N.E.2d 528; *Rehnbloom* v. *City of Berwyn*, 329 Ill. App. 327, 68 N.E.2d 479; *Phillips* v. *City of Chicago*, 332 Ill. App. 443, 75 N.E.2d 403; *Ranson* v. *Wilson*, 335 Ill. App. 7, 80 N.E.2d 381, 384.

[7] *Flournoy* v. *Brown*, 200 Miss. 171, 26 So. 2d 351.

[8] *Rapant* v. *Ogsbury*, supra.

[9] *Quinn* v. *Wilkerson*, Tex. Civ. App., 195 S.W.2d 399, 403.

[10] *McLean* v. *McCollum*, Tex. Civ. App., 209 S.W.2d 959, 960.

(k) against such a preponderance of evidence that it is clearly wrong;[11]

(l) against great weight and preponderance of evidence;[12]

(m) against weight of the evidence;[13]

(n) against clear and unmistakable contrary evidence;[14]

(o) against weight of credible evidence;[15]

(p) clearly against great weight of the evidence;[16]

(q) manifestly erroneous;[17]

(r) clearly excessive or inadequate;[18]

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[11] *Texas Emp. Ins. Assn.* v. *Foreman*, Tex. Civ. App., 262 S.W.2d 248, 251

[12] *Texas Emp. Ins. Assn.* v. *Foreman*, supra.

[13] *Luongo* v. *City of Syracuse*, 285 App. Div. 1015, 139 N.Y.S.2d 30, 31; *Gardner* v. *Schulman*, 272 App. Div. 888, 71 N.Y.S.2d 284.

[14] *McCormick Transp Co.* v. *Philadelphia Transp Co.*, 161 Pa. Super. 533, 55 A.2d 771.

[15] *Strone* v. *Hudson Transit Lines*, 278 App. Div. 815, 104 N.Y.S.2d 521; *Guinan* v. *Smith*, 278 App. Div. 1006, 105 N.Y.S.2d 633; *Treshman* v. *Republican Pub Co*, 270 App. Div. 505, 60 N.Y.S.2d 544, 546; *Piptone* v. *Standard Fruit & SS Co.*, 270 App. Div. 844, 60 N.Y.S.2d 465, 466; *rearg. den.* 271 App. Div. 786, 66 N.Y.S.2d 158.

[16] *Wolf* v. *Providence Wash Ins Co. of Providence*, R. I., 333 Mich. 333, 53 N.W.2d 475, 480.

[17] *Mitchell* v. *Shreveport Laundries*, La. App., 61 So. 2d 539, app. trans. 221 La. 686, 60 So. 2d 86.

[18] *Burge* v. *Windolph*, La. App., 79 So. 2d 912, 914; *Sandifer* v. *Thompson*, Mo., 280 S.W. 2d 412, 415; *Triplett* v. *Beeler*, Mo., 268 S.W. 2d 814, 819; *Hooper* v. *Conrad*, Mo., 260 S.W. 2d 496, 501.

(s) grossly excessive or gave less than full compensation;[19]

(t) based on the testimony of one or more witnesses whose testimony was extremely improbable or incredible;[20]

(u) the result of mistake, passion or partiality;[21]

(v) a shock to reason and justice;[22]

(w) without basis in fact;[23]

(x) wholly unacceptable to reasonable minds;[24]

(y) inherently improbable;[25]

(z) flagrantly against the evidence;[26]

(aa) so clearly unsupported as to indicate misapprehension;[27]

(bb) clearly wrong;[28]

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[19] *Hallada* v. *Great Northern Ry*, Minn., 69 N.W.2d 673, 687, *cert. den.* 350 U.S. 874.

[20] *Practico* v. *Rhodes*, 17 N.J. 328, 111 A.2d 399, 402; *State* v. *Petrolia*, 21 N.J. 453, 459, 122 A.2d 639, 643; *Taylor* v. *Vanderveer*, 19 N.J.L. 22, 30.

[21] *Hager* v. *Weber*, 7 N.J. 201, 210, 81 A.2d 155, 161; *Wheeler* v. *Yellow Cab of Orlando, Fla.*, 66 So. 2d 501, 503.

[22] *Batts* v. *Joseph Newman, Inc.*, 3 N.J. 503, 513, 71 A.2d 121, 126.

[23] *Hartpence* v. *Grouleff*, 15 N.J. 545, 548, 105 A.2d 514, 516.

[24] *Kircher* v. *Atchison, T & SF Ry Co.*, 32 Cal. 2d 176, 195 P.2d 427, 433.

[25] *Schouten* v. *Crawford*, Cal. App. 257 P.2d 88, 91.

[26] *Hollis* v. *Fisk*, Ky, 242 S.W.2d 1012, 1013.

[27] *In re Appropriation of Easement for Highway Purposes*, 90 Ohio App. 471, 107 N.E.2d 387, 389.

[28] *Borcherding* v. *Eklund*, 156 Neb. 196, 55 N.W.2d 643, 649.

(cc) based on testimony which was not worthy of belief;[29]

(dd) against great preponderance of evidence;[30]

(ee) wrong as to one of five factual grounds. (Whereupon, the appellate court directed the entry of a directed verdict as to the entire case);[31]

(ff) decided by whims and caprice of jury;[32]

(gg) suggestive of gross misapprehension to extent which shocks understanding and moral sense of appellate court;[33]

(hh) in conflict with the justice of the case;[34]

(ii) manifestly wrong;[35]

(jj) against such a preponderance of evidence that the reviewing court felt the jury's conclusion was clearly wrong;[36]

(kk) clearly against weight of the evidence;[37]

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[29] *Price* v. *Mackner*, Minn., 58 N.W.2d 260, 262.

[30] *Homewood Dairy Products Co.* v. *Robinson*, 254 Ala. 197, 48 So. 2d 28, 32; *Sorrell* v. *Lindsey*, 247 Ala. 630, 25 So. 2d 725, 726.

[31] *Vaughn* v. *Searle*, 75 Or. Adv. 2265, 536 P.2d 1247.

[32] *Sorg* v. *Royal*, Fla., 41 So. 2d 317.

[33] *Thomson* v. *Fouts*, 203 Ga. 522, 47 S.E.2d 571, 573.

[34] *Quinn* v. *Wilkerson*, Tex. Civ. App., 195 S.W. 2d 399, 403.

[35] *McLean* v. *McCollum*, Tex. Civ. App., 209 S.W.2d 959, 960.

[36] *Texas Emp. Ins. Assn* v. *Foreman*, Tex. Civ. App., 262 S.W.2d 248.

[37] *Kinsfather* v. *Grueneberg*, App. Div., 365 N.Y.S.2d 903, 907 (1975).

(ll) against the great weight of evidence;[38]

(mm) manifestly and palpably contrary to the evidence viewed as a whole;[39]

(nn) suggestive of passion, partiality, mistake, or lack of due consideration;[40]

(oo) contrary to manifest weight of evidence;[41]

(pp) opposite conclusion is clearly evident;[42]

(qq) shockingly inadequate;[43]

(rr) clearly wrong and unreasonable;[44]

(ss) so small it plainly indicates that award was product of misguidance;[45]

(tt) shocking to conscience of reviewing court;[46]

(uu) misled by some mistaken view of merits of the case;[47]

[38] *Jones* v. *Morgan*, 58 Mich. App. 455, 228 N.W.2d 419, 422 (1975).
[39] *Vanderweyst* v. *Langford*, Minn., 228 N.W.2d 271, 272 (1975).
[40] *Abdulla* v. *Pittsburgh & Weirton Bus Co.*, W. Va., 213 S.E.2d 810, 823 (1975).
[41] *Scrimager* v. *Cabot Corp.*, 23 Ill. App. 3rd 193, 318 N.E.2d 521, 523 (1974).
[42] *Scrimager* v. *Cabot Corp.*, supra. at 525.
[43] *Ford* v. *Long*, Mo. App. 514 S.W.2d 378, 380 (1974).
[44] *Brewer* v. *Case*, 192 Neb. 538, 222 N.W.2d 823, 827 (1974).
[45] *Fournier* v. *Loiselle's Estate*, Vt., 326 A.2d 155, 156 (1974).
[46] *Badgett* v. *McDonald*, Ala. Civ. App., 304 So. 2d 228, 230 (1974).

(vv) unjustified upon any reasonable view of the evidence;[48]

(ww) a clearly evident incorrect result;[49]

(xx) shocking to its sense of justice;[50] and

(yy) wholly unreasonable under circumstances of the case.[51]

The extent to which state appellate courts have vacillated with respect to the issue when jury factual determinations may be retested or reweighted on appeal, even within the confines of a single state, is discussed in *12 Rutgers L.R.* 482, Appellate Review of Facts in New Jersey, Jury and Non-Jury Cases.

[48] *Vermont Terminal Corp* v. *Crane*, 132 Vt. 589, 326 A.2d 158, 160 (1974);
[49] *Lewis* v. *Hull House Assn*, 25 Ill. App. 3d 617, 323 N.E.2d 600, 607 (1975).
[50] *Simmons* v. *Mullen*, 231 Pa. Super. 199, 331 A.2d 892, 901 (1974); *City of Houston* v. *Jean*, Tex. Civ. App., 517 S.W.2d 596, 602 (1974).
[51] *Ahmed* v. *Collins*, 23 Ariz. App. 54, 530 P.2d 900, 904 (1975).

APPENDIX E

IMPORTANCE OF JURY TRIALS TO FRAMERS OF CONSTITUTION AND BILL OF RIGHTS

That Justice Story was correct (see p. 9, supra) with respect to the importance of jury trials to those who drafted the Constitution and Bill of Rights is shown by the following sources, among many, many others:

> Thos. Paine (1777), Foner, *The Complete Works of Thomas Paine* 273-77; Thomas Jefferson, Letter to Madison (December 20, 1787), *12 The Papers of Thos. Jefferson* 438-42; & 1st Inaugural Address; Patrick Henry, *Speech on the Stamp Act*, Virginia Convention (March 23, 1775) and also at the Virginia Ratifying Convention of the Constitution, where he called the jury trial the "best privilege" of citizens and "dear to human nature" *(3 The Debates in the Several State Conventions on the Adoption of the Constitution* 21-663 (1788) (During the debates Patrick Henry kept coming back to the Bill of Rights issue—and the trial by jury—virtualy every day. One of his speeches lasted seven hours); Roger Sherman, *Letters of a Countryman*, 1787, *Essays on the Constitution of the United States*, 218-221; John Dickinson, *Letters of Fabius*, 1788, *Pamphlets on the Constitution of the United States*, 181-187 ("Trial by Jury is our birthright; and tempted to his own ruin, by some seducing spirit, must be the man, who in opposition to the genius of United

America, shall dare to attempt its subversion"); John Jay, *Address to the People of New York on the Constitution*, 1788, *Pamphlets on the Constitution of the United States*, 67-85; James Madison, *5 The Writings of James Madison*, 319 (1789) ("it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury . . ."); also *1 Annals of Congress*, June 8, 1789, where Madison said:

> "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."

James Wilson, at the Pennsylvania Ratifying Convention, said that trial by jury "has excellences that entitle it to a superiority over any other mode, in cases to which it is applicable." *(Debates*, December 11, 1787)

Sherman, Dickinson, Madison and Wilson were all signers at the Constitutional Convention. Jefferson was in Paris, but wrote many letters in support of the jury trial from there. *(12 The Papers of Thos. Jefferson*, 438-42, 570-72; *14 The Papers of Thos. Jefferson* 649-51).

Late in the Constitutional Convention itself, Colonel George Mason moved that a Bill of Rights be adopted because "it would give a great quiet to the people. Eldridge Gerry concurred and moved that a Committee be appointed to prepare such Bill. However, the motion did not pass, because it was felt the State Declarations of Rights would suffice, and that the legislatures could be "safely trusted." *(1 Schwartz, The Bill of Rights* 435-8).

Spurred by the attacks of Richard Henry Lee, Eldridge Gerry and Luther Martin, among many others, because of the absence of such explicit Bill of Rights, the constitution passed by only a narrow margin in many states. In Massachusetts the vote was 187-168; in New Hampshire, 57-46; in Virginia, 89 to 79; in New York, 30-27, and in Rhode Island, 34-32. Prior to the ratification of the constitution by the 13th state (Rhode Island) the Bill of Rights had been ratified by eight other states. Nine days later Rhode Island became the 9th state to ratify the Bill of Rights, thus insuring its passage. (The World Almanac 720, 724 [1975]).

Even prior to the federal constitution, the right of trial by jury was already secured in several states: New Jersey *(Concessions and Agreements of West New Jersey,* 1677, Ch. XXII); *Fundamental Constitution of Carolina Art. III* (1669); *Georgia Constitution, Art. LXI* (1777) ("freedom of the press and trial by jury to remain inviolate forever"); *Maryland Declaration*

of Rights, Art. III (1776); *Massachusetts Declaration of Rights, XII* (1780); *New Hampshire Bill of Rights XX* ("sacred . . . procedure") (1783); *New Jersey Constitution XXII* ("The inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.") (1776); *New York Charter of Libertyes and Privileges* (1683); *New York Constitution Art. XLI* (1777) ("remain inviolate forever"); *North Carolina Declaration of Rights XIV* (1776); *Northwest Ordinance Journals of Congress* (1786-7) ("That the inhabitants of such districts shall always be entitled to the benefits of . . . the trial by Jury").

See also Blackstone, *Commentaries,* Bk. 3, 379; Alexis de Tocqueville, *1 Democracy in America* (2nd ed.) quoted in Joiner, *Civil Justice & The Jury* (109-111 [1962]); *Magna Charta* ("No freeman shall be taken or imprisoned or disseized or outlawed or banished or anyways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land") (1215); *Declaration of Independence* (one of the indictments of King George III was "For depriving us in many cases, of the benefits of trial by jury"); *North Carolina Constitution, Art. I,* § 25 ("in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and shall remain sacred and inviolable"); *Declaration of Rights and*

Grievances VII (1765) ("That trial by jury is the inherent and invaluable right of every British subject *in* these colonies"); *Delaware Declaration of Rights, § 13* (1776) ("That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people"); *Pamphlets on the Constitution of the United States,* 219-257 *(Address on the Proposed Plan of a Federal Government,* 1788, by Alexander Contee Hanson) ("The institution of the trial by jury has been sanctified by the experience of ages. It has been recognized by the constitution of every state in the union. It is deemed the birthright of Americans, and it is deemed that liberty cannot subsist without it.")

The right of trial by jury seems to be virtually the only spot in the constitutions and statutes of the several states which is identified as "sacred" and/or "inviolate".